IN THE

Supreme Court of the United States

OCTOBER TERM—1951

No. 178

UEBERSEE FINANZ-KORPORATION, A.G.,
Petitioner,

v.

J. HOWARD MCGRATH, Attorney General, as Successor to the Alien Property Custodian

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR PETITIONER.

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INDEX TO REPLY BRIEF.

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REPLY BRIEF FOR PETITIONER.

At the outset, the Custodian's brief misstates the issue before this Court. It says that the first question presented is (Br. 2):

> "1. Whether findings that enemies had substantial ownership in and complete control of Petitioner are supported by the evidence."

We do not believe that this Court granted certiorari in order to review the weight and sufficiency of evidence and therefore have raised no issue here attacking the findings of fact. The only question before this Court is whether the conclusions of law with respect to enemy taint made by the courts below on the basis of findings are correct.

The reason the Custodian attempts to distort the issue here into one of fact rather than one of law is that he is unwilling to accept the conclusions of law either of the District Court or of the Court of Appeals. Both of these opinions held that the mere existence of a right to receive dividends, secured by escrow of corporate stock in neutral hands, when held by an enemy justified the confiscation of the entire corporate property of the Petitioner.

The Custodian does not even discuss the principles of an enemy taint adopted by the courts below as a basis of their decisions. The entire defense rests on repeated assertions in his brief, which have no foundation in the findings, that the enemy Wilhelm von Opel, actually controlled and managed Petitioner corporation during the war. Since these assertions are contrary to the findings, the Government is forced to go at length into the record and pick up odds and ends of testimony with which it tries to stretch the findings so as to establish actual wartime enemy control of Petitioner.

If, therefore, we show that the courts below did not find, and that the evidence does not establish, wartime control or ownership of the Petitioner by the enemy, Wilhelm von Opel, we will have met the only argument on which the Government now relies as a defense to Petitioner's claim.

I.

The Courts Below Did Not Find, and the Evidence Does Not Establish, Wartime Control or Ownership of Petitioner by Wilhelm Von Opel.

The Court of Appeals in its opinion (R. 2325-7) and subsequent memorandum (R. 2332-4) does not even mention any enemy control of Petitioner. It rests its decision not on enemy control but solely on the ground that the usufructuary interest "including the right to the income from the shares" (R. 2326) of Petitioner constituted, "the ownership of the right to the dividends on the stock of domestic corporations" (R. 2327) owned by Petitioner and thus "in-

volves the ownership by enemy nationals of the economic benefits of American business." (R. 2327.) The District Court was affirmed on this "foregoing ground" without considering "other matters deemed by that court to support its conclusion." (R. 2327.)

The District Court's Opinion and the Custodian's Position.—It appears clearly from the District Court's opinion that the Custodian's position at the end of the trial was not based on any sort of reliance upon control of the Petitioner by the enemy during the war. After the evidence was in, the District Court in its opinion outlined the claims of the Custodian as follows:

1. That the gift agreement was void as a matter of German law.

2. That it was a sham transaction and not *bona fide.*

3. That at the very least Wilhelm and Marta von Opel had a "substantial part ownership in the securities" (R. 44) either by way of a right *in rem* or *in personam* by contract.

4. That Petitioner was an enemy because it did business in enemy territory through Transdanubia Bauxit.

5. Finally, that Fritz von Opel himself, although concededly a Liechtenstein national, was also a German national and therefore an enemy.

With respect to these contentions, the District Court held that the gift agreement was valid but that there was established a substantial enemy interest in the Petitioner's shares, i.e., a usufruct *in rem.* The District Court relied on its findings of Frankenberg's agency for Wilhelm von Opel solely for the purpose of proving compliance with the admitted requirement of German law that a usufructuary, personally or through an agent, must obtain and maintain copossession of the corporate shares subject to the usufruct. Without such copossession, the enemy would have had a mere contract right to receive dividends and not a right *in rem* in the shares. The opinion contains no fur-

ther reference to Frankenberg's agency and no suggestion that that agency continued for management purposes or control at any time during the war. It merely states that the Opel parents continued to hold and own their usufructuary interest until the assets were vested in 1942. This reference to the transaction whereby the usufruct *in rem* was created is the only reference to the Frankenberg agency in the eleven pages of the opinion. (R. 41-51.)

It was on the basis not of control but of the mere existence of a usufructuary interest that the District Court decided the case.

The District Court's Findings.—There is no finding of control during the war for management purposes. The finding on the subject, taken in connection with the Court's opinion and explanation of the finding shows that the Court did not consider that any such control existed or that it was an issue in the case. The finding is as follows (Finding 40, R. 58):

> "Thereafter Hans Frankenberg continued to be at all times and still is managing director of Uebersee Finanz-Korporation, and there is abundant evidence establishing that *up to and including 1940* he exercised control over the major policies of the corporation. From 1932 until the date of vesting, Dr. Eugene Meier was President and chief officer of plaintiff corporation. Dr. Meier testified that *in the year 1940 plaintiff corporation was without connection with Fritz von Opel or with Hans Frankenberg and that it became necessary for Dr. Meier to have a direct hand in the management of the affairs of the corporation.* The Court is not able to find from this testimony the extent to which, if any, Dr. Meier, after 1940, participated in the management of the corporation. The record is bare of evidence that after 1940 Frankenberg exercised control over plaintiff, but the record is also bare of any evidence of a termination of such control. From all of the evidence, including the evidence establishing that Frankenberg did exercise control during the years 1932 to 1940 inclusive, and establishing motive and intent for such exercise of control, and in the absence of any evidence that Frankenberg ceased to exercise such con-

trol, the Court draws the inference and finds as a fact that Frankenberg continued to exercise control over plaintiff corporation until the date of vesting." (Italics supplied.)

It is clear from this finding with respect to control of Petitioner:

1. That until some time in 1940 Hans Frankenberg exercised control over Petitioner.

2. That in the year 1940 Frankenberg severed all connection with Petitioner, and it became necessary for Dr. Meier, its President and chief officer, to manage its affairs.

3. That there is no evidence in the record that after 1940 Frankenberg exercised any control whatever over Petitioner.

The apparent inconsistency in the finding between the Court's recital of Dr. Meier's testimony that Frankenberg had severed all connection with Petitioner in 1940 and the stated "inference" that he continued in control after 1940 is explained in a colloquy between counsel and the District Court after the findings were drafted.[1] In that colloquy the Court made it clear that in indulging in a presumption or inference that Frankenberg's control had not terminated he was not speaking of management control but only of that copossession of Petitioner's shares necessary to maintain the integrity of Wilhelm von Opel's usufructuary right (R. 1782-3).

> "The Court: There are two forms of control that I am talking about. There are two forms. One of them exists by virtue of this usufructuary interest. That is number one. Now, that did not end, in my judgment.

[1] The same colloquy also explains the inconsistency between the detailed findings of fact in Finding 40 (R. 58) and the general statement in Finding 41 (R. 59) which reads as follows:

> "Hans Frankenberg acted at all relevant times as managing director of Uebersee Finanz Korporation as agent for Wilhelm von Opel."

This general finding simply refers to the continued existence of the copossession necessary for the existence of the usufruct.

"I might grant that you are right on this other kind of control, by virtue of what the Supreme Court said, namely, that Frankenberg was over here bossing and telling them what to do. As you say, that might violate the Trading with the Enemy Act. I do not know whether it does or not. Let us say it does, though. I might say that if it violated the Trading with the Enemy Act—or, as the Supreme Court says, an agency—the boss over here—between a person not a resident of Germany and one who is a resident and a citizen of Germany would be a rational deduction—that is true. I mean to say where an agency of another one over here, an American with an agency in Germany, would end at the outbreak of war, that is not going to break down his control by virtue of this usufructuary interest.

"You may be right, and I do not know whether you are right. You may be right, *but I am inclined to think that, so far as bossing the company is concerned, I am not entitled to presume that after the outbreak of war; but on that usufructuary interest, I simply do not think that the declaration of war by the United States with Germany would break down Wilhelm's—*

"Mr. Gallagher: That is a different point that I won't labor with you.

"The Court: That is right, but that very point would constitute the enemy taint and would constitute the right in rem that I am talking about in this conclusion of law. Do you see what I mean?

"Mr. Gallagher: I know, and I am not trying to dissuade you, and I know you have made up your mind on that.

"The Court: That is the heart of my decision, and I cannot believe it is wrong." (Italics supplied)

The Court also stated (R. 1779):

"The Court: I do not care whether he was an agent after the war or not. My point is the usufructuary interest had been set up and it existed as of the time of the war and that the breaking out of the war between the two sovereigns would not kill this man's rights, according to the laws of Germany, which we now respect."

The Court further stated (R. 1787):

> "The Court: For that reason that the usufruct in my judgment, did exist, even though we concede that the outbreak of war stopped his agency."

This Finding 40 alone, as explained by the colloquy, is a complete refutation of the entire case of actual control argued by the Custodian. It is therefore unnecessary to consider the evidence. We do so only to make our reply to the Custodian's brief complete.

The Evidence.—Not only is it true that the Courts below did not base their decisions on any finding of actual control, it is also true that under the uncontradicted evidence no such finding of actual control could have been made. It is the uncontradicted testimony of Dr. Meier, President of Petitioner, that after Frankenberg left Switzerland in 1940, it was Meier, not Frankenburg, who managed Petitioner's corporate affairs (R. 1486). Moreover, Frankenberg in 1940 left Switzerland permanently, not temporarily, and it is not to be presumed in the absence of contrary evidence which the District Court found lacking (R. 58), that he continued to manage the affairs of Petitioner, a Swiss corporation domiciled in Liestel. He obtained permanent residence in the United States, filed a declaration of intention to become a United States citizen, and took the statutory oath (8 U.S.C. 731) preparatory to his subsequent naturalization. As one of several directors of Petitioner, he had limited authority to act for it and could act and sign for Petitioner only jointly with another director (R. 1461, 2049). Furthermore, the evidence is clear that the Harvard and Spur companies, before and after vesting Petitioner's shares in them, were managed and operated by their own boards of directors, American citizens, with a free hand and not by Wilhelm von Opel, through Frankenberg or otherwise (R. 1197, 2026-8); Report of the Office of Alien Property for 1945, p. 89. It has never been and could not be suggested that the American management of these companies was in any way dominated and controlled by enemies.

The straw on which the Government attempts to rely is that the control by Frankenberg must be presumed to have continued after the war commenced because of the finding that he controlled in 1940. As we have shown by the colloquy explaining the Court's findings, no such inference or presumption was indulged by the District Court with respect to management control as opposed to copossession of Petitioner's shares under the usufructuary agreement. But if the Court had indulged in such a presumption of the continuance of management control, it would have been not only contrary to evidence but erroneous as a matter of law.

It would have been contrary to the evidence because the record shows and the Court found that Dr. Meier, a neutral, had testified that Frankenberg's control had terminated in 1940 over a year before the war, that he had lost connection with the company; and that Dr. Meier had taken over the control. If an inference or presumption of continued control in 1942 is to be made, it can only be the control of the last person found to be in control, namely, Dr. Meier. It is erroneous as a matter of law to infer or presume that a prior control of Frankenberg in some unexplained manner revived and replaced Dr. Meier's control. The only available explanation is that given by the District Court to the effect that he presumed Frankenberg's control of Petitioner's shares by copossession continued. It was never suggested that Meier replaced Frankenberg for this purpose in 1940.

The Custodian (Br. 41) attempts to infer some sort of control in the following statement:

> "Wilhelm was in no way barred from communicating with petitioner in Switzerland and petitioner, in turn, was free at all times to communicate with the United States."

The Government is not entirely frank here because Dr. Meier, who was in control at the outbreak of the war testified that he never met or had any communication at any time with Wilhelm von Opel (R. 1462). Furthermore the

companies were managed by American directors whose loyalty is not questioned.

But even without the testimony that Frankenberg abandoned control in 1940 when he came to America, no presumption or inference of his continued control during the war could be drawn as a matter of law from his control prior to the war. Certainly it cannot be presumed that Frankenberg, a permanent resident of the United States and an applicant for American citizenship, was committing the crime of trading with the enemy. The legally correct presumption is that under such circumstances any agency of Frankenberg's, executory in nature, ceased when the war commenced. *Sutherland* v. *Mayer*, 271 U. S. 272, 288, 297; *Williams* v. *Paine*, 169 U. S. 55, 73, affirming 7 App. D. C. 116; *Insurance Co.* v. *Davis*, 95 U. S. 425, 429-430.

Evidence Cited by Custodian.—It is probably irrelevant to comment upon evidence cited by the Custodian, the sole purpose of which is apparently to create an unfavorable impression of Fritz and Wilhelm von Opel. Nevertheless, for the sake of completeness, we will refer to it briefly.

A great point is made of the fact that one of the purposes of the gift to Fritz was to get money out of Germany and another was to use that money for his support away from Germany. This does not have the defogatory implication which the Government suggests. Quite the contrary, it shows that Fritz and Wilhelm von Opel were attempting to deprive the German Reich of funds rather than to build up enemy assets abroad. This removal of funds was so contrary to Government policy that Wilhelm von Opel was fined 3,500,000 Reichsmarks for the transaction (R. 448).

Another typical distortion of the facts is the statement that Wilhelm von Opel (a prominent manufacturer) was a prominent Nazi party member (Br. 6). The record shows that he joined the Nazi party upon orders from General Motors Corporation (R. 141), which he represented on the board of directors of Adam Opel A.G. and no doubt to protect the valuable asset of the Opel name in Germany

which General Motors had purchased (R. 400). There is no evidence whatever that he was a prominent party member and, as a matter of fact, he was not.

In its effort to establish actual enemy management and control of Petitioner and its American assets at the time the United States entered the war on December 8, 1941, and at the time the assets were vested beginning on June 4, 1942, the Custodian makes repeated reference to isolated bits of oral testimony culled from the long record and coming from strongly biased witnesses concerning conversations allegedly occurring many years before 1941 and 1942. For example, in an effort to give the erroneous impression that the Opel parents exercised their usufruct the Custodian at three places in his brief (pp. 16, 43, 53) asserts that Petitioner's assets were sold to pay a fine imposed by the Nazi German government in 1934 on Wilhelm von Opel. These assertions flatly contradict the trial court's specific findings and misstate the record. The District Court found (Fdg. 53, R. 61) that "neither Wilhelm nor Marta von Opel ever demanded or received any income of any nature from the usufruct". It was stipulattd (R. 448) that a fine was imposed on Wilhelm von Opel but it was not stipulated, claimed, proved or found that any income from the usufruct was sought or obtained to pay the fine as the Custodian asserts.

The Custodian also attempts to show management control of Petitioner and the Harvard and Spur companies in 1941 and 1942 by arguing that four years before the war in 1937 an officer of these companies, one Hoffacker, employed by Fritz von Opel, not Wilhelm von Opel, was discharged after Wilhelm von Opel in Germany discovered some allegedly adverse information about Hoffacker who formerly resided in Germany. The Custodian ignores the fact that it was Fritz, and not Wilhelm, who employed Hoffacker, and also ignores the fact that Hoffacker's connection with the companies was severed after he had a business disagreement with Fritz von Opel (R. 1996, 2020, and 1235). The fact that the alleged adverse information about

Hoffacker came first to the attention of Wilhelm von Opel, quite naturally because Wilhelm von Opel was in Germany, falls far short of establishing that Wilhelm von Opel and not Fritz von Opel discharged Hoffacker and fails wholly to prove management and control of Petitioner by Wilhelm von Opel.

Control and management of Petitioner in 1941 and 1942 by Wilhelm von Opel is not proved by testimony of John Houghland, for example, to the effect that Fritz von Opel in 1937 and 1939 made remarks indicating the interest of Wilhelm von Opel in the operation of properties which were the proceeds of his gift to his son. Even if true[2] this trivial remark at the most indicates that Fritz von Opel was interested in having his business associates meet his father and in having his father aware of the manner in which the substantial gift was being administered.

Similarly, Wilhelm von Opel's control of Petitioner in 1941 and 1942 is not proved by such testimony as that of Rudolf Deku concerning a remark attributed to Wilhelm von Opel at a dinner party many years earlier to the effect that it was worth a German fine, imposed in 1934, "to have his assets outside of the German locked safe" (R. 569; Custodian's Br. 43).[3] It was argued that the assets referred to was the gift (R. 576). Even if such a remark was made, and it was denied by Dr. Gros, another member of the dinner party (R. 1014), it is clear from the record that the court did not give weight to this testimony. It was

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[2] Houghland, a biased witness hostile to Fritz von Opel, admitted his desire to get control of the Spur Company away from Fritz von Opel and even admitted his willingness to do everything to get Fritz von Opel deported (R. 1209-10). In fact Houghland attempted unlawfully to dilute Petitioner's equity in the Spur Company by issuance of additional unauthorized stock and was prevented from doing so only under threat of criminal proceedings by the Alien Property Custodian (R. 945-946; 1183-1184).

[3] This witness had been associated in a private banking business in Berlin with his brother, Erich Deku, who defrauded Wilhelm von Opel of millions of marks and, through the efforts of Fritz von Opel, was brought to justice and given a long prison sentence (R. 573). The witness' bias was evident.

introduced for the sole purpose of proving the gift was a sham. The court disregarded it and held the gift was valid. In so finding the court must have relied upon the testimony of Dr. Gros who was present at this party and categorically denied that such statement was ever made (R. 1014).

The Custodian refers (Br. 36) to the transcript of the record on appeal in the "Gold case" which the Custodian introduced into evidence not to prove the German law on the rights of a usufructuary but in support of his contention that the gift was a sham (R. 1481). The District Court rejected this contention but now the Custodian attempts to use Fritz von Opel's affidavit in the "Gold case" as evidence of German law of a usufructuary's rights. In effect this is an attack on the findings which set forth the rights of a usufructuary. Moreover, it is an erroneous use of a conclusion of law contained in a memorandum of law (R. 2082) prepared by Petitioner's counsel in the "Gold case" and then also included in a long affidavit of factual matters (R. 1998-2018) prepared by counsel for Fritz von Opel who is not an attorney.[4] The affidavit has no relevance here to

[4] It is noteworthy that the "Gold case" affidavit of Dr. Wronker-Flatow (R. 1986-90), the German attorney who prepared the gift agreement, does not state that Fritz von Opel, legal owner of the Petitioner's shares, had mere "naked title" but sets forth the provisions of the German Civil Code disclosing the owner's substantial interests in shares subject to a usufruct. Apparently influenced by a Roman law precedent that in a usufruct by legacy the heir had "bare ownership" (*nudum proprietatum*), rather than by the German law expert's affidavit, the reference to "naked title" was included in the legal memorandum and Fritz von Opel's affidavit. The only purpose of the memorandum (submitted in support of Petitioner's application for a gold export license) on this point was to reply to the Government's contention that Petitioner's corporate entity, as a foreign corporation not present in the United States or subject to the Treasury's gold regulations, should be ignored and the gold treated as the property of Fritz von Opel who was present in the United States. The case was decided on the entirely different ground that the regulations applied to all gold in the United States without regard to the presence of the owner. *Uebersee Finanz-Korporation* v. *Rosen*, 83 F. 2d. 225 (C. A. 2) cert. denied 298 U. S. 679.

change the findings which, on the basis of the expert testimony on German law, determine the rights of the legal owner and the usufructuary in Petitioner's shares.

II.

The Usufruct Alone, Without Wartime Enemy Management Control of Petitioner, is Not Enemy Taint.

The sole issue in the case (an issue which the Government does not argue) is whether the ownership of the usufruct, standing by itself in the absence of enemy management control, is enemy taint. The enemy right to part of the dividends on Petitioner's shares for life is certainly not ownership of those shares themselves. Therefore Petitioner is not tainted as a neutral corporation might be if actually owned by an enemy. Section 1054[5] of the German Civil Code expressly recognizes that a usufruct is not ownership but rather is a usufructuary right in property owned by another.[6] A usufruct, unlike more substantial rights usually associated with ownership, is so limited and personal that it cannot be transferred by deed or will.[7] The

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[5] Section 1054 (Wang translation) provides: If the usufruct violates the rights of the owner to a serious extent, and if he continues the injury in spite of a warning by the owner, the latter may apply for an injunction.

[6] Similarly in Roman and American law it is recognized that a usufruct is not ownership but merely a right in property owned by others (R. 371, 1296-7). Justinian's Institutes, (Lib. II Tit. IV). A usufruct may be granted without surrendering ownership, Radin, *Handbook of Roman Law* (1927), p. 338; Heubner, *History of German Private Law* (1918) pp. 349-51; *Restatement of the Law of Property*, Sec. 10; *Wright* v. *Central of Georgia Ry.*, 236 U. S. 675, 680-81; *State* v. *Davidson*, 198 Ga. 27, 31 S. E. (2d) 225; *Canal & Akron Hydraulic Co.* v. *Fontaine*, 72 Ohio App. 93, 60 N. E. (2d) 225; *Modern Music Shop* v. *Concordia Fire Ins. Co.*, 131 Misc. 305, 226 N. Y. S. 630, 635.

[7] Article 1059 of the Civil Code (Wang translation) provides: "Usufruct is not transferable. The exercise of the usufruct may be transferred to another." The translator's annotation provides: "The transferee has, in such a case, only a jus in personam against the usufructuary."

usufructuary interest in Petitioner's shares was limited to the right to income or dividends and the trial court so found (R. 60). Even the right to demand income in this case may have been limited by the fact that the purpose of the reservation of income, support of the usufructuaries if in need in their old age, never materialized (R. 134, 1825). The usufructuaries' voice in management of the property, even if it included any voting rights, was limited to protection of the usufructuary "right to the income from the securities" (R. 60).

The Petitioner submits that its shares were directly and legally owned by the neutral, Fritz von Opel, and the usufruct was not "ownership" as ownership is understood either in general legal usage or in the decisions discussing enemy taint.

In conclusion on this point, it is submitted that the right here consists in an executory agreement in 1931 to pay dividends on stock secured in 1935 (R. 57-58) by escrow of the shares. It was made solely for a business purpose. It was never intended to be and never was used to build up enemy assets abroad. The sole and limited control which the enemy might have exercised would have been the degree of control available to a usufructuary of shares under German law who was found by the Court to have symbolic co-possession of Petitioner's shares through an agent, Frankenberg, who was a resident of the United States and an applicant for citizenship long before the war. Any executory and limited agency which he might have had under the usufruct to control property on behalf of the enemy was revoked as a matter of law when war commenced. The actual control of the American companies during the war was in their American management established long before the war and so trusted by the Custodian that no changes were made after vesting. There was therefore neither an enemy legal right to control Petitioner and its American companies nor a possibility of exercising enemy control.

III.

Neither Fritz Von Opel's Ownership of Petitioner's Shares Nor Petitioner's Ownership of Shares of Transdanubia Bauxit Are Evidence of Enemy Taint of Petitioner.

The Custodian's contention that the circumstances of the acquisition of Liechtenstein citizenship by Fritz von Opel transmits an enemy taint to Petitioner through Petitioner's shares owned by Fritz von Opel is answered completely by the finding that he did lawfully and validly become a naturalized citizen of Liechtenstein more than two years before the United States was at war. (Fdg. 7, R. 52-53). His Liechtenstein citizenship was conceded, and it was conceded that his neutral citizenship was not open to collateral attack (R. 48).

The Custodian states (Br. p. 57) that "the court found that *to the extent* Fritz carried on activities on behalf of petitioner, he did so under the guidance and control of his father, Wilhelm von Opel. (Fdg. 45, R. 59.) "This statement takes unwarranted liberty with Finding 45 which is that the activities of Fritz "*to a large degree* were carried on with the guidance and direction of Wilhelm von Opel, or his agent, Hans Frankenberg." (Italics supplied.) It also ignores the fact that such guidance ceased more than a year before the war. In fact, there was evidence that Fritz acted independently without advice from Wilhelm or Frankenberg on corporate matters including, for example, the employment of Hoffacker to assist him in the management of Petitioner's investments in shares of the Harvard and Spur companies. Fritz exercised his own judgment in the important transaction whereby all of the 600 Opel shares were sold instead of modifying the option and retaining 300 shares (R. 668-70). It was after this transaction was completed by Fritz that Wilhelm indicated his approval of it (R. 2229).

Moreover, the transactions which the Custodian relies upon (Br. p. 58) happened long prior to the war. If at that

time Fritz was guided by his banker Frankenberg and by his father who made him this substantial gift, both older men presumably with longer business experience, this fact cannot transmute Fritz, a neutral citizen, into an enemy and thus constitute Petitioner an enemy because of Fritz' ownership of its shares. On the findings, which control here, Fritz was not "as much his father's agent as was Frankenberg" as the Custodian erroneously asserts (Br. p. 57).

In the absence of a direct finding that Fritz as Petitioner's stockholder acted at all relevant times as agent of Wilhelm, the Custodian cannot here substitute random remarks attributed to Fritz by financially interested and hostile witnesses, which were denied by Fritz (R. 1567, 1573), and which were not relied on by the District Court in its findings. In this respect again the Custodian has stretched the record beyond plausible or tolerable limits.

We suggest, however, that it is not necessary for this Court to go beyond the findings which were made and the opinions of the courts below and to laboriously check the accuracy of our references of the record. It is sufficient to apply to the findings made the correct rule of law.

The Custodian refers to "Petitioner's doing of business in Hungary" (R. 21, 58), but the District Court refused to make such a finding. The Court did find that in the Spring of 1941, long before war between the United States and Hungary commenced on December 13, 1941, Fritz von Opel refused requests from Transdanubia for additional funds to continue mining operations and suggested that the mines be sold or leased (Finding 31, R. 56-57). Neither Petitioner nor Fritz received any income from Transdanubia at any time (Finding 31, R. 57).

Section 2 of the Act includes within the definition of "enemy" a foreign corporation doing business in enemy territory. It is clear as a matter of fact and as a matter of law that Petitioner did not do business in enemy territory (Petitioner's Brief, pp. 31-32). The statutory definition of

enemies cannot be expanded and circumvented, as the Custodian attempts to do, to mean that mere ownership of stock in an enemy corporation by a neutral corporation makes it an enemy. Certainly it would not be contended that an American corporation was made an enemy by taint because of ownership of stock in Hungarian or other enemy corporations. Similarly, a neutral Swiss corporation, entitled to the protection of the Fifth Amendment and equal treatment with an American corporation in this respect, cannot be condemned as an enemy by this indirect method where it is not an enemy under the statutory definition.

IV.

Petitioner's Claim for the Return of the Non-Enemy Interest in Its American Securities is Valid.

The Government argues that it may confiscate the entire vested property of Petitioner because its stockholder, Fritz von Opel, many years before the war pledged his certificates of Petitioner's stock to secure an agreement to pay his enemy parents 80% of the dividends for their lives.

We have contended first that the pledge of this neutral Swiss corporation's stock does not create an enemy interest in the American assets of the said corporation. As an alternative, we contend that if it is proper to pierce the Petitioner's corporate veil, as the Court of Appeals did, on the ground that Petitioner is a personal holding company of investments, the only possible result is to create in Wilhelm, the enemy, an interest in the American securities equivalent to his interest in the Swiss stock. If that is the enemy's interest, that is the only thing which the Custodian can confiscate. Certainly Wilhelm's right cannot be increased by ignoring the difference between Petitioner's assets and shares of Petitioner's stock.

This enemy usufructuary interest is not a proportionate interest in the Petitioner's stock any more than a mortgage is a proportionate interest in real estate or than a re-

mainder is a proportionate interest in property because it follows a life estate. To assert, as the Custodian does here, that the non-enemy interest of Petitioner in its assets can be confiscated is like saying that where property is mortgaged to an enemy the interest of the mortgagor ought to be confiscated, or is the same as asserting that where there is a life estate in an enemy any remainder in a neutral may be confiscated. Such a conception of enemy taint involves a a shocking appropriation of the property of friendly neutrals which could be equally applied to the property of Americans in neutral countries. The Custodian's contentions obscure the issue but do not answer this argument.

The Custodian suggests that Petitioner would have him go to Switzerland and sue in the Swiss courts to compel the payment of dividends on Petitioner's shares. The answer to this contention is that if the enemy usufruct is in Petitioner's shares the Custodian can have that enemy interest liquidated under the Washington Accord (Pet. Br. 25-26) by the Swiss Government without recourse to the Swiss courts. If, on the other hand, the Petitioner's corporate veil is pierced and the usufruct is held to be an interest in the American property (as the courts below held), that interest can be enforced in the courts here. The American shares could be subjected to the usufruct by a direction from the Court that they be held in escrow to secure copossession in Petitioner, the owner, and the Custodian in place of the usufructuaries. The Custodian would have such voting rights to protect the right to dividends on the American shares as were accorded by German law.

The Custodian's argument proposes first that the Petitioner's corporate veil be ignored for the purpose of claiming an enemy usufructuary interest directly in the American shares and then that the Petitioner's corporate entity be respected for the purpose of claiming that he could not seize the usufruct in this country and therefore should be allowed to confiscate all of Petitioner's American assets including not only the usufruct for life but the remainder as well.

The Custodian also argues that the Petitioner's claim that it should recover the non-enemy interest in its American assets was not made in time. But the record shows that this claim was raised first in the District Court when that Court had indicated its belief that there was an enemy interest (R. 50-51). In passing on this claim, the District Court erroneously treated it as a claim by Fritz von Opel, rather than by Petitioner as the proper claimant for Petitioner's property in which the enemy had no interest. Since Fritz was not a plaintiff the Court held his right could not be adjudicated in this suit. But this error of the District Court in denying the Petitioner's claim does not affect the fact that the question was raised. The question was raised again in the Court of Appeals in the argument and raised the third time in a motion to clarify the opinion of the Court of Appeals. The Court of Appeals decided the question against the Petitioner not on the technicality urged by the Government but on the merits. It held that Petitioner could not get back any of the property because Wilhelm, the enemy, was the owner of the shares of Petitioner and Fritz von Opel had only a contract right to 20% of the dividends.

It is clear from the record and the Custodian concedes (apart from its attack on the loyalty of Fritz) that Petitioner owns assets in this country which are enemy owned only to the extent that they are subject to a usufructuary right in the enemy. It is equally clear that if the corporate veil is pierced the American courts may enforce that right for the Custodian. Nowhere in the Custodian's brief is there any argument justifying the confiscation of the entire property as enemy-owned other than the technicality that the claim was not made in time and the second technicality that in order to enforce the usufructuary right the Custodian would have to go to Switzerland. Neither of these technicalities have any validity. Neither were considered by the Court of Appeals.

CONCLUSION.

Petitioner's first contention is that the existence of the usufruct in the absence of wartime showing of control by the enemy does not justify the confiscation of its property. Its second contention which it advances only in the event the Court finds against it on the first, is that in no event can the Custodian confiscate, in the absence of control, anything more than the right of the enemy in this case to 80% of the dividends for their lives.

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